Environmental Justice

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Environmental Justice

Outline

- First Principles of EJ Practice
- Title VI of the Civil Rights Act
  - Enforcement by DoD
- Executive Order on EJ
- Case Example: EJ Complaint at Kelly AFB
- Things to Do

Environmental Justice

- The intersection of environmental and civil rights law
- Corollary of ‘60s environmentalism
- Uses environment to advance broader causes of social justice
- Only hazy connection between EJ claims and protecting public health

Environmental Justice

- No single accepted definition
  - common element tends to be that some environmental action impermissibly burdens a minority population.
- Can be hotly controversial
- Cutting edge
- Body of law just starting to take shape.
  - *See Shintech* case (permits delayed and complicated based on EJ concerns.)

What Sort of Injustices are Alleged?

- Distribution of benefits and burdens of environmental decision-making unfair
  - permitting industrial facility
  - cleanup decisions
  - impact of pollution exposures
- Procedural injustice
  - exclusion from BRAC Cleanup Teams
  - withholding of information, e.g., PHAs
- Corrective injustice
  - unequal enforcement

Why Do We Care?

- charges of environmental injustice increasingly leveled at DoD facilities
- “Hail Mary” litigation: charges could slow down facility sitings, cleanups, BRAC transfers
- examples include:
  - Kelly AFB, TX
  - Vieques Island, PR (Navy)
  - Pine Bluff, AR (Army)
  - Fallbrook Naval Weapons Station, CA
  - Badger Army Ammunition Plant, WI
  - Anniston Facility, AL (Army)

Why Do We Care?

- Executive Order 12898 prohibits federal entities from discriminating on impermissible grounds.
- Title VI of the Civil Rights Act prohibits recipients of federal funds from discriminating on impermissible grounds.
- Courts may find violation of Title VI where recipients provide fewer, or inferior services or benefits to members of a protected group.
- Federal agency providing funds has primary duty to enforce Title VI as to its recipients.

Principal Authorities

- Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d
- Executive Order 12898 (“Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”) (11 Feb. 1994)
- DoD Regulations, 32 CFR Part 195 (implements Title VI); DoDI 1350.2, 5500.11
- AFI 36-2707 (implements Title VI)

Title VI of the Civil Rights Act of 1964

- Prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance.

Title VI of the Civil Rights Act

"No person in the United States shall,

on the ground of race, color or national origin,

be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any program or activity receiving federal financial assistance."

-- 42 USC § 2000d

Title VI of the Civil Rights Act

What is "Federal Financial Assistance"?

- includes more than money:
  - services, real property interests, personnel
- does not include procurement contracts, unless subsidies
- does not include contracts of insurance or guarantee

Title VI of the Civil Rights Act

What is a Recipient?

- may be public or private entity
- does not apply to federal government
- normally the entity which directly receives the federal assistance
  - but may instead be an indirect recipient, *e.g.*, a private college whose students receive federal educational loans
  - may also be "subrecipient," *e.g.*, local agency recipient of fed funds passed thru state agency
- gov't. agency can be "infected" by unit

Title VI of the Civil Rights Act

What is Discrimination?

- Title VI bars *intentional* discrimination.
- Title VI also authorizes regulations which prohibit *disparate impacts*, whether or not acts intentionally discriminatory.
  - Agencies, including DoD, freely have adopted such regulations.

Title VI of the Civil Rights Act

How to Satisfy "Disparate Impacts" Test

- Recipient uses *neutral procedure* or practice
- that has a *disparate impact on protected individuals*
- and such practice *lacks substantial legitimate justification*
  - Even if recipient makes showing of such justification, it may be attacked as "pretext;" and recipient must show no equally effective alternative exists.

Title VI of the Civil Rights Act

Disparate Effects: Generic Checklist

- Is there harm?
- If yes, is there disparate impact?
- If yes, is there substantial legitimate justification?
- If yes, is justification a mere pretext?
- If no, is there alternative with less disparate impact?

Title VI of the Civil Rights Act

- Environmental claims: a difficult fit with Title VI
  - How to show harm
    - not as simple as failure to get job.
    - is it pollution exposure, or health risks, or actual effects?
  - How to show disparate impacts, when comparison is between “populations segments” not individual people
  - How to evaluate claim that impact is justified

Title VI Enforcement

DOD Regulation

Requires that no recipient of federal funds violate Title VI, *i.e.*, that:

no person shall --

on ground of race, color or national origin,

be excluded from participation in, . . . or subjected to discrimination under ,

any program or activity receiving federal financial assistance from any DoD component.

-- 32 CFR Pt 195.

Title VI Enforcement: DoD Reg.

- Must file within 180 days of discrimination
- Uses “disparate effects” test.
- Component secretary enforces.
- Low threshold triggers investigation.
  - “prompt” investigation required if complaint “indicates a *possible* failure to comply . . . . “ § 195.8(c)
- if find non-compliance, seek voluntary compliance

Title VI Enforcement: DoD Reg.

- If fail to achieve voluntary compliance, must enforce by administrative or judicial action.
- Administrative Action:
  - Funds cutoff requires
    - express finding of non-compliance
    - after opportunity for hearing
    - approval by Secretary
      - after notice to congressional committees
- Judicial Referral:
  - DoJ brings injunction action.

Title VI Enforcement

- Some courts have construed Title VI as providing a private right of action.
  - But Supreme Court has not ruled. *Chester*
- Exhaustion of administrative remedies not required.
- Title VI amended to waive 11th Amendment immunity.
- If intentional discrimination, damages lie

Executive Order 12898 ("Federal Actions to Address Environmental Justice in Minority . . . and Low-Income Populations")(11 Feb. 1994))

- "Each federal agency shall conduct its programs, policies and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color or national origin."

  -- § 2-2

Executive Order on Environmental Justice

- “To the greatest extent practicable . . . , each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations . . . . “
  § 1-102

Executive Order on Environmental Justice

- applies to federal entities
- expressly directed toward activities affecting health and environment
- uses “disparate effects” (not intent) test
- not enforceable

Kelly AFB EJ Complaint

- 4300 acre facility in San Antonio, Texas
- used as depot for many decades
- 52 discrete contamination sites
- contaminated by used solvents, degreasers, petroleum, etc.
- estimated total cleanup costs: $ 335 m.
- Elaborate public participation mechanisms, e.g., RAB, meetings, flyers

Kelly AFB EJ Complaint

- Alleges violations of Title VI and E.O.
- Multiple federal respondents: DoD, EPA, HHS (ATSDR), HUD
- Selected claims:
  - agencies exclude RAB and community members from BCT
  - agencies refuse to cleanup off-site
  - reuse plan gives insufficient consideration to pollution exposures
  - agencies withhold information
  - agencies manipulate public health assessmt

Kelly AFB EJ Complaint

Next Steps

- AF IG investigation and report
- Legal review of IG report in process
- Coordinate with other respondent federal agencies
- Issue report

US EPA Initiatives

- Subject to the “white-hot glare.”
- Anticipates issuing new *Federal Register* Title VI guidance shortly.
  - Cumulative risk assessment principles
- Hamstrung by insufficiency of analytic tools and policy framework.
- Struggling with how to move beyond disputes over permitting, and air emissions, into more complex EJ complaints.

Things to Do

- Look at your regulations.
- Consider whether your site is ripe for EJ claim
- Decide what legal expertise you need
- Consider what steps you can take to prevent claim, or defeat it
  - broaden public process
  - bilingual publications or presentations
  - meetings at night
  - Determine if regulators can help you
  - Consider what role NEPA plays
- Decide who will conduct investigation
- Decide how to coordinate with other fed agencies.

Questions?

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